(2)

No. 91-814

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PHILLIP AMATO, RITA AMATO, and JAMES RAFFA,

Petitioners,

vs.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, SECOND DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the petitioners' confrontation rights were violated when, in a jury trial conducted jointly with a non-jury trial of other defendants, petitioner was permitted to cross-examine all witnesses as to every aspect of their testimony, but the cross-examination by the non-jury co-defendants was conducted out of the presence of the jury.

2. Whether the right to counsel of choice precludes a trial court from disqualifying an attorney for a violation of the ethical rule against an advocate becoming a witness.

3. Whether the right to compulsory process requires the production of a witness whose testimony would be cumulative.

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Petitioners Phillip Amato, Rita Amato, and James Raffa seek a writ of certiorari to review the orders of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered on May 28, 1991 which unanimously affirmed the

judgments of the Supreme Court of the State of New York, Queens County, entered on September 9, 1988, convicting petitioners of arson in the third degree (N.Y. Penal Law §150.10) and imposing sentence. *People v. Phillip Amato,* __A.D.2d__, 570 N.Y.S.2d 817; *People v. Rita Amato,* __A.D.2d__, 570 N.Y.S.2d 1017; *People v. James Raffa,* __A.D.2d__, 570 N.Y.S.2d 819. Leave to appeal to the New York Court of Appeals was denied on June 25, 1991, __N.Y.2d__, and reconsideration of the application was denied on August 21, 1991. __N.Y.2d__. The Petition for a Writ of Certiorari was filed within the time prescribed by Supreme Court Rules 13 and 28.

STATEMENT OF THE CASE

Introduction

On April 20, 1987, at approximately 11:00 p.m. a fire broke out at 171-27 Gladwin Avenue in Queens, a single-family house leased by the City of New York a few days before for the purpose of housing foster babies. In the weeks immediately preceding the fire, petitioners, who owned neighboring homes on Gladwin Avenue, repeatedly threatened the owners of the premises that petitioners would burn the house down rather than allow New York City to carry out its plans. On the evening of the fire, petitioners lured a security guard hired by the City away from the premises with an explosion and a verbal warning. Minutes before the fire broke out, petitioners Phillip Amato and James Raffa secured two others (Michael Scotto and

Joseph Minchella) to act as lookouts while Amato, Raffa and Ugo Serrone went behind the property adjourning the leased premises with a third accomplice, Ugo Serrone. Petitioner Raffa carried a clear liquid in an unmarked bottle concealed beneath his coat. Glass was heard breaking behind the leased residence one minute later and the house was soon filled with smoke and flames. Petitioners were indicted by a Queens County Grand Jury on charges of arson in the third degree (N.Y. Penal Law §150.10) and burglary in the first and third degrees (N.Y. Penal Law §§140.30, 140.20). Petitioner Phillip Amato and Michael Scotto were charged in the same accusatory instrument with committing the crime of criminal solicitation in the fourth degree (N.Y. Penal Law §100.05).[1]

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1 Minchella testified for the petitioner and was not charged with any crime.

The Pre-trial Hearing to Suppress Statements and the Motion for Disqualification

Petitioner Phillip Amato moved to suppress statements made by him on the ground that they were obtained in violation of his state constitutional right to counsel. In requesting a hearing on the issue, he argued specifically that his retained attorney had contacted law enforcement authorities prior to the time the statements were taken and had ordered the cessation of any questioning. If true, this face alone would require suppression under New York law. *People v. Skinner*, 52 N.Y.2d 24, 436 N.Y.S.2d 207 (1980).

Prior to the commencement of the hearing, the prosecution moved to disqualify Phillip Amato's attorney, the same attorney who had allegedly contacted law enforcement authorities, on the

ground that he was an indispensable witness on behalf of his client and that he was therefore precluded from continuing the representation under New York's Code of Professional Responsibility. DR5-101, 5-102. The court held its determination of the motion in abeyance while the hearing was commenced.

During the course of the proceedings which followed counsel continued to represent defendant Amato, conducting direct and cross-examination of several witnesses. Counsel also took the stand on his client's behalf. As predicted, counsel testified that on April 27, 1987, prior to the time the statements were made, he telephoned the Fire Marshall Command Post where members were investigating the arson. He allegedly informed the "dispatcher" that

he represented petitioners Phillip Amato and Rita Amato and that he "did not want them questioned or visited by any law enforcement officials." The prosecution vigorously contested this testimony at the hearing, not only by attempting to impeach counsel on cross-examination but also by introducing the testimony of the fire marshall who received counsel's call. Counsel had not, according to this prosecution witness, stated the purpose of his call, that he represented anyone, or that the petitioners should not "be visited or questioned," but had simply asked that the fire marshall assigned to the case return his call. In their respective memoranda of law on the hearing issues, petitioner's counsel and the prosecutor argued counsel's credibility at length on this pivotal issue. The hearing court credited

counsel's testimony, held that there existed a violation of the state right to counsel and suppressed the statements.[2] The court also issued a separate written decision recognizing counsel's ethical violation of the advocate-witness rule, as the prosecutor had argued, and disqualified counsel.

The defendant thereafter moved for reargument of the disqualification motion. Ignoring the prior ethical violation, counsel sought to assure the court that neither counsel nor a member of his firm would be called again at trial. Counsel argued, among other things, that because the defendant's statement had been suppressed, there would no longer be any need for the testimony of counsel or a member of his

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2 The court did not rule on the voluntariness of the statements generally.

firm in violation of the rule. The court adhered to its original decision, noting, inter alia, that if petitioner Phillip Amato were to take the stand at trial, the suppressed statements could still be introduced for impeachment purposes. *Harris v. New York,* 401 U.S. 222 (1971); *People v. Meadows,* 64 N.Y.2d 956, 958, 488 N.Y.S.2d 643 (1985). The voluntariness of the statements under the state constitution would then once again be an issue before the jury, necessitating counsel's testimony. N.Y. Crim. Proc. Law §§710.70, 60.45(2)(b)(ii); *People v. Graham,* 51 N.Y.2d 214, 447 N.Y.S.2d 918 (1982).

The Trial

Petitioners were jointly tried with their co-defendants Scotto and Serrone. While petitioners elected to proceed before a jury, Scotto and Serrone waived

their jury trial rights. Under the procedure adopted by the court, the jury did not hear the cross-examination conducted by counsel for the non-jury defendants. However, the jury did hear cross-examination as to the evidence concerning those defendants, to the extent petitioners chose to conduct such cross-examination.

The evidence adduced at trial established the following: In April of 1987, the City of New York leased the private one-family residence at 171-27 Gladwin Avenue in Flushing, Queens for the purpose of housing foster children. After these plans became public, petitioners Rita and Phillip Amato, who owned homes on the same block as the leased premises, threatened the owner of the house on several occasions that they would burn the residence down rather than

see it converted to the planned social service use. Petitioner Raffa, who lived three houses away from the planned foster residence, also threatened the owner over the phone and was overheard telling Phillip Amato in reference to the leased premises: "If you smell smoke, wait five minutes before you do anything."

On April 20, 1987, petitioner Rita Amato forced the city's security guard from the home using a firework explosion and a warning to the guard that she "could not be responsible for what happened" if the guard remained on the premises. She also telephoned a television news station and suggested that the house might be burned down. Later that evening, petitioner Phillip Amato directed co-defendant Michael Scotto and Joseph Minchella, a witness for the prosecution, to act as lookouts

and entered the driveway of the house adjoining the leased premises with petitioner Raffa and co-defendant Serrone. Raffa was nervously concealing an unmarked bottle of clear liquid under his jacket. Within one minute, glass was heard breaking behind the leased residence and flames and smoke began pouring out of the house soon afterward. As the house burned, petitioners stood by, some toasting the fire with glasses of liquor. Fire marshalls subsequently determined that the fire was intentionally set by use of a flammable liquid.

Despite counsel's pretrial assurances that there would no longer be any need for the testimony of prior counsel or a member of his firm, petitioner Phillip Amato did, in fact, call prior counsel's law partner, Joseph

Giaimo, to the stand. Giaimo, who represented petitioner Rita Amato in a civil suit to enjoin the City from carrying out its planned use, testified concerning the temporary restraining order which allegedly precluded the city from taking possession of the house or sending a security guard to occupy it. The alleged violation of the TRO was designed to provide an innocent explanation for many aspects of the otherwise unexplained conduct of the defendants on the night of the fire, including the repeated efforts to get the security guard out of the house and the solicitation of Minchella to "watch guard," allegedly for a violation of the TRO. The testimony regarding the order also demonstrated the defendants' pursuit of their goal by lawful means which supposedly raised a doubt as to why they

would abandon these efforts in favor of illegal means. The prosecution contested the validity and effect of the TRO, contending that the order was stayed prior to the date of the fire, thereby eliminating the supposed justification for the defendant's actions on the night the house was burned. Giaimo, in turn, attempted to contradict the prosecutor's contention by testifying that he personally checked the court records and found no evidence that the order was stayed.

The Verdict and Sentence

Petitioners were convicted of arson in the third degree.[3] Michael Scotto and Ugo Serrone were convicted of criminal solicitation in the fourth degree.

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3 The solicitation charge against Phillip Amato was dismissed after opening statements. The jury convicted petitioners of burglary, but those charges were dismissed by the court.

Petitioner Phillip Amato was sentenced to an indeterminate term of imprisonment of from two to six years, petitioner James Raffa was sentenced to one and one-half to four and one-half years incarceration, and petitioner Rita Amato was sentenced to one to three years incarceration.

The Appeals

The Appellate Division, Second Judicial Department, affirmed the judgments of conviction in three separate opinions dated May 28, 1991. *People v. Phillip Amato,* __A.D.2d__, 570 N.Y.S.2d 817; *People v. Rita Amato,* __A.D.2d__, 570 N.Y.S.2d 1017; *People v. James Raffa,* __A.D.2d__, 570 N.Y.S.2d 819. The court held that the use of a joint jury and non-jury trial was proper and that the procedure used by the court did not prejudice the defense. __A.D.2d__, 570

N.Y.S.2d at 818. The court also held that petitioner Phillip Amato's right to counsel of choice was not violated by the trial court's disqualification of his attorney. The court observed that the right to counsel of choice is not absolute and that one restriction on the right is the "advocate-witness rule," embodied in Code of Professional Responsibility Disciplinary Rules DR5-101 and 5-102. The Appellate Division noted that counsel had testified at the pre-trial hearing and found that the trial court was "understandably concerned with the prospect that the propriety of the defendant's incriminating statements might still surface as an issue at trial, leading to the possibility that the defendant's trial counsel would have to testify." __A.D.2d at___, 570 N.Y.S.2d at 819. The court also found that the

"propriety of the trial court's ruling was later borne out when a member of the law firm in question in fact testified at trial." *Id.*

The Appellate Division rejected petitioner's remaining contentions as meritless without further comment.[4] Leave to appeal to the New York Court of Appeals was denied on June 25, 1991, __N.Y.2d__, and reconsideration of the application was denied on August 21, 1991. __N.Y.2d__.

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4 The court also found the evidence of guilt was sufficient to support the arson convictions of each defendant and addressed one further issued raised by petitioner James Raffa concerning the admissions of a prior inconsistent statement of a prosecution witness. These contentions are not raised in the Petition before this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

The issues raised by petitioners concerning the procedure adopted by the court at their joint jury and non-jury trial, the disqualification of counsel for his violation of the advocate-witness rule, and the production of a witness offering cumulative testimony, do not warrant this Court's review. As the Petition for a Writ of Certiorari in this matter makes clear, none of these matters involve any conflict among state and federal court decisions. *See Sup. Ct. R.* 10.1(a) and (b). Furthermore, the Appellate Division decision in the instant matter did not decide any federal issue in a manner that conflicts with the prior decisions of this Court and none of the issues presented require modification or clarification of this Court's prior decisions. *See Sup. Ct. Rule* 10.1(c).

A. The Joint Jury and Non-Jury Trial

This case does not raise any large issues concerning the propriety or procedure for holding joint trials before different fact finders. Petitioners do not challenge the trial court's decision to conduct a joint jury and non-jury trial. Nor could they, in view of the uniform approval of such procedures by every state and federal court that has considered the matter.[5] Instead, they

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5 All of the federal circuit courts and state courts of last resort which have considered the issue agree that joint trials before different fact finders are permissible in the absence of a showing of prejudice. *See, e.g., United States v. Lebron-Gonzalez,* 816 F.2d 823, 831 (1st Cir. 1987); *United States v. Lewis,* 716 F.2d 16, 19 (D.C. Cir. 1983); *United States v. Hayes,* 676 F.2d 1359, 1366 (11th Cir.), *cert. denied,* 459 U.S. 1040 (1982); *United States v. Rimar,* 558 F.2d 1271, 1273 (6th Cir. 1977), *cert. denied,* 434 U.S. 984 (1978); *United States v. Sidman,* 470 F.2d 1158, 1167-1170 (9th Cir. 1972), *cert. denied,* 409 U.S. 1127 (1973); *People v. Ricardo B.,* 73 N.Y.2d 228, 538 N.Y.S.2d 796 (1989); *People v. Harris,* 47 Cal 3d 1047, 767 P.2d 619 (1989); *State v. Beam,* 109 Idaho 616, 710 P.2d 526 (1985), *cert. denied,* 476 U.S. 1153 (1986); *People v. Ruiz,*

challenge only the trial court's ruling that prohibited the jury from hearing the cross-examination conducted by counsel for the non-jury defendants. According to petitioners, this procedure violated the petitioners' Confrontation Clause rights.

Review of this claim is unwarranted. Petitioners were given the full and fair opportunity to cross-examine the People's witness required by the Confrontation Clause. *Delaware v. Fensterer,* 474 U.S. 15, 21-22 (1985). The critical inquiry is whether the ruling of the court interfered with the defendant's opportunity for effective

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94 Ill.2d 245, 447 NE2d 148 (1982), *cert. denied,* 462 U.S. 1112 (1983); *State v. Corsi,* 86 NJ 172, 430 A.2d 210 (1981). (footnote continued) Petitioners acknowledge that joint trials before different fact finders are an appropriate answer to the problems of court congestion and the scarcity of judicial resources. Petition for Writ of Certiorari, pp. 18-19.

cross-examination. *Kentucky v. Stincer*, 482 U.S. 730, 740 (1989).

The trial record establishes that the court did not limit or interfere in any way with cross-examination by counsel for petitioners. In particular, they were never precluded by the court from asking any question before the jury pertaining to the acts of, or evidence relating to, the non-jury co-defendants. They have not identified any cross-examination conducted by the co-defendants out of the presence of the jury which they could not also have conducted in front of the jury.

In fact, with regard to the challenged testimony of the owner of the burned premises, the court varied its pre-arranged procedure at the request of petitioners' counsel and allowed the non-jury defendants to examine the witness

first. All of the petitioners thus had the benefit of hearing the non-jury cross-examination before their own and had the opportunity to repeat any portion of that cross on their own cross-examination if they believed it significant.

Similarly, notwithstanding petitioners' conclusory assertions with regard to Joseph Minchella's testimony, counsel for petitioners had every opportunity to introduce the alleged prior inconsistent testimony of Minchella regarding the non-jury co-defendants. Counsel never alleged that they were unaware of the prior inconsistent testimony of the witness nor did they ever offer any other reason why the prior inconsistent statements could not have been brought out before the jury as part of petitioners' cross-examination.

Because petitioners' opportunity to cross-examine the witnesses was never restricted, both the trial court and the Appellate Division properly rejected petitioners Confrontation Clause claims. *Van Arsdale,* 475 U.S. at 679; *Fernesterer,* 474 U.S. at 679.

Moreover, although petitioners have repeatedly asserted that the cross-examination of Minchella by counsel for the non-jury defendants contained instances of impeachment with prior sworn testimony regarding the acts of Serrone and Scotto, a review of that cross-examination reveals that no such impeachment actually took place. Thus, even if the jury had heard the non-jury defendants cross-examination, they would not have heard any prior sworn

contradictory statements.[6]

If petitioners had been granted the severance they requested, they would have been in no better position than they were at the joint trial. At separate trials, the evidence regarding Scotto and Serrone, with whom petitioners were alleged to have been acting in concert, would still have been admissible, *Anderson v. United States,* 417 U.S. 211, 219 (1974); *People v. Plummer,* 36 N.Y.2d 161, 163-164, 365 N.Y.S.2d 842, 845

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6 Petitioners allege in a conclusory fashion that as a result of the procedure adopted by the court, the jury was unable to hear "inconsistencies" in the testimony of one of the fire marshalls. Petition for a Writ of Certiorari, p. 15. The only such inconsistency was one fire marshall's "guess" as to what time a second fire marshall left the burned premises on the morning after the fire. As to this, the trial court immediately offered a remedy to petitioners, inviting them to recall the second fire marshall to the stand so that he could be confronted with the alleged discrepancy. Petitioners declined the offer, however, and they are thus not now in a position to maintain that they were prevented from presenting the inconsistency to the jury.

(1975); *People v. Kornegay,* __A.D.2d__, 559 N.Y.S.2d 552, 553 (2d Dept. 1990), and the jury would still not have heard any cross-examination by the non-jury co-defendants. Petitioners have never offered any reason why they should have been placed in a better position at the joint trial than they would have been in the event of separate trials. Thus, petitioners' claim is fundamentally flawed for this reason also. *See United States v. Cunningham,* 723 F.2d 217, 230 (2d Cir. 1983), *cert. denied,* 466 U.S. 951 (1984).

Since petitioner's claim raises no conflict among lower court decisions, and since the law concerning the Confrontation Clause as enunciated by this Court does not require modification or amplication in order to resolve this issue, the Appellate Division's decision

does not warrant review by this Court.

B. The Disqualification of Petitioner Phillip Amato's Attorney

The disqualification of petitioner Phillip Amato's attorney was a straightforward application of the universal rule against an advocate becoming a witness and does not warrant this Court's review. The violation of the rule by petitioner's counsel was not hypothetical or speculative -- petitioner's attorney actually testified at the pre-trial hearing on a pivotal, disputed issue of fact. Moreover, the court had ample reason to mistrust counsel's assurances that no further testimony would be required.

In *Wheat v. United States,* 486 U.S 153 (1988), this Court observed that while the right to counsel of choice is comprehended by the Sixth Amendment, "the

essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Id.* at 159. This Court went on to state that the right to counsel of choice is circumscribed in many important respects, most notably by the courts "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id.* at 697.

As the federal and state courts considering the issue have uniformly recognized, and as petitioners acknowledge (Petition for a Writ of Certiorari, pp. 21-22), one of the limitations on the right to counsel of choice is the "advocate-witness" rule.

See, e.g., United States v. DeFazio, 899 F.2d 626, 629-632 (1st Cir. 1990); *United States v. Kwang Fu Peng,* 766 F.2d 82 (2d Cir. 1985); *United States v. McKeon,* 738 F.2d 26, 34-35 (2d Cir. 1984); *State v. Rapuano,* 192 Conn. 228, 471 A 240, 242-243 (1984); *People v. Rivera,* __A.D.2d__, 568 N.Y.S.2d 435 (2d Dept. 1991); *see also Manhalt v. Reed,* 847 F.2d 576, 581 (9th Cir. 1988); *United States v. Nichols,* 841 F.2d 1485, 1503 (10th Cir. 1988); *Ex Parte Brown,* 551 So.2d 1009, 1010-1011 (Ala. 1989); *State v. Leonard,* 707 P.2d 650, 652-654 (Utah 1985).

While the rule is currently embodied in Disciplinary Rules 5-101 and 5-102 of the Code of Professional Responsibility, promulgated by the American Bar Association in 1969 and adopted in New York in 1970, the rule predates the Code by at least half a

century. *See* American Bar Association Canons of Ethics, Canon 19 (adopted 1908). Indeed, the origins of the rule can be traced back to the middle of the 19th century. 3 J. Wigmore, *Evidence* §1911 (3d ed.).

As interpreted by the New York Courts, the rule requires an attorney to withdraw from employment, or be disqualified, when he learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client. *People v. Limongelli,* 156 A.D.2d 472, 548 N.Y.S.2d 759, 761 (2d Dept. 1989); *Solomon v. N.Y. Property Insurance Underwriting Association,* 118 A.D.2d 695, 500 N.Y.S.2d 41 (2d Dept. 1986); *North Shore Neurosurgical v. Levy,* 26 A.D.2d 598, 421 N.Y.S.2d 100 (2d Dept. 1979).

Further, as state and federal

courts agree, the decision whether counsel should be allowed to act both as an attorney and as a witness is a matter addressed to the sound discretion of the trial court. *See, e.g., United States v. DeFazio,* 899 F.2d at 629; *United States v. Morris,* 714 F.2d 669 (7th Cir. 1983) (citing cases); *United States v. Kwang Fu Peng,* 766 F.2d at 87; *Solomon v. N.Y. Property,* 118 A.D.2d at 695, 500 N.Y.S.2d at 42; *Death v. Salem,* 111 A.D.2d 778, 780, 490 N.Y.S.2d 526 (2d Dept. 1985).

Here, counsel's violation of the rule was beyond dispute. He represented Phillip Amato while appearing as a witness on his client's behalf at the hearing. His testimony, far from concerning a "matter of formality" or an "uncontested matter," was the pivotal issue in the case, contested vigorously by the prosecution on both cross-

examination and on the rebuttal case. Counsel's credibility accounted for much of the argument between the defense and the prosecution in their respective memoranda of law and was critical to the trial court's decision on the suppression motion. Under these circumstances, the court's decision to grant the prosecutor's motion to disqualify counsel was well within its discretion. Indeed, disqualification should have been granted even prior to the hearing when the prosecutor initially raised the issue. The fact that petitioner received the benefit of counsel's representation for the duration of the hearing, several weeks longer than it should have continued, does not lend support to his current argument.

Furthermore, as the trial court

correctly noted, the possibility that counsel would testify on the issue of the voluntariness of petitioner's statements if they were introduced for impeachment purposes at trial raised the prospect of yet another violation of the rule. Contrary to petitioner's assertion, under New York law the jury must determine the voluntariness of a statement including the question whether it was obtained in violation of a defendant's state or federal constitutional rights. N.Y. Crim. Proc. Law §710.70, 60.45(2)(b)(ii); *People v. Graham,* 51 N.Y.2d 214, 447 N.Y.S.2d 918 (1980).

The issue as to which counsel testified in the instant matter, his efforts to contact the Fire Marshall Command Post, went directly to the validity of petitioner's statement under

the state constitution. *See People v. Skinner,* 52 N.Y.2d 24, 436 N.Y.S.2d 207 (1981). Thus, as the Appellate Division held, the state trial court correctly perceived a substantial likelihood that counsel would be compelled to testify if the petitioner's statements were admitted at trial.

Petitioner's citation to *People v. Bing,* 76 N.Y.2d 331, 559 N.Y.S.2d 474 (1990) in this regard is misplaced. That case, while eliminating the derivative right to counsel arising from a suspect's representation on unrelated charges, did not alter the New York Court of Appeals prior rulings concerning counsel who seeks to intervene in the case under investigation. 76 N.Y.2d at 350, 559 N.Y.S.2d at 485.

Furthermore, the fact that

petitioner Rita Amato filed an affidavit in an unrelated motion alleging that her husband would not take the stand at trial did not require a different result on the disqualification motion. Even assuming that the court was obligated to consider this unrelated affidavit on this issue, petitioner Rita Amato's statement in no way bound her husband nor did petitioner Phillip Amato ever provide confirmation of his wife's statement. Petitioner Phillip Amato was free to take the stand in his own defense at trial, and the prosecutor was free to use the tape-recorded statements for impeachment purposes in that event. Accordingly, the concern that another violation of the advocate-witness rule would occur was not eliminated by Mrs. Amato's affidavit.

Finally, petitioners' assurances

that the testimony of counsel or other firm members would not be required at trial were belied when petitioner called counsel's law partner at trial. As specified in the provisions of DR 5-102, where an attorney is disqualified due to the advocate-witness rule, other members of the firm are likewise disqualified from the representation. *See Cardinale v. Golinello,* 43 N.Y.2d 288, 295, 401 N.Y.S.2d 191 (1977); *see also* DR 1-102(a)(2). The partner's testimony here was crucial to the defense, providing an explanation for much of the petitioners' conduct that occurred on the night of the fire and demonstrating the petitioners' pursuit of lawful means to achieve their goals. Further, the prosecutor disputed the validity, effect and significance of the order. Thus, had counsel continued his representation

of petitioner, a second violation of the advocate-witness rule would, in fact, have occurred.

In short, the decisions of the courts' below on the disqualification issue were entirely consistent with this Court's decision in *Wheat* and with the federal and state courts decisions permitting the invocation of the "advocate-witness" rule in a criminal case.

C. Petitioners' Request to Call the Precinct Commander

The trial court's decision not to compel the testimony of the Commander of the 109th Police Precinct in Queens was a reasonable exercise of discretion and does not raise a constitutional question worthy of this Court's review. The Commander would have testified that there were no complaints on file at the

Precinct pertaining to threats made by the petitioners against the owner of the burned residence. Prior to this request, the trial court had enforced a subpoena duces tecum for all complaints filed by the owner of the premises during the relevant period, and the owner had admitted on the stand that no complaints concerning the threats were among the documents produced. Because the trial court did nothing more than exercise the discretion afforded to it under this Court's decisions to preclude repetitive or cumulative testimony, and because no conflict exists over the applicable law, review by this Court is unwarranted.[7]

As this Court held in *Taylor v. Illinois*, 484 U.S 400 (1988), the

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7 The Appellate Division did not comment on this claim in affirming the judgments of conviction.

compulsory process clause does not grant defendant an "unfettered right to offer testimony that is . . . inadmissible under standard rules of evidence." *Id.* at 410. On the contrary, even where the evidence offered goes to the bias of a prosecution witness, trial judges retain "wide latitude to impose reasonable limits on the introduction of evidence by a defendant based on concerns about, among other things, confusion of the issues or . . . interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdale,* 475 U.S. 673, 679 (1986). Indeed, state and federal courts uniformly agree that cumulative testimony offered by a defendant may be precluded. *See, e.g., Hamling v. United States,* 418 U.S. 87, 127; *Goldsby v. United States,* 160 U.S. 70, 73 (1895); *United States v. Webster,* 750 F.2d 307

(5th Cir. 1984), *cert. denied,* 471 U.S. 1106 (1985); *Rose v. Estelle,* 694 F.2d 1008, 1010-1011 (5th Cir. 1983); *Wright v. State,* 270 Ark. 78, 603 S.W.2d 408 (1980); *People v. Clarke,* 155 A.D.2d 283, 547 N.Y.S.2d 46 (1st Dept. 1989); *see also State v. Johnson,* 231 Kan. 151, 643 P.2d 146 (1982); 1 J. Wigmore *Evidence* §10a, p. 685 (Tillers Rev. 1983).

Here, the trial court merely exercised its discretion to preclude evidence which was otherwise before the jury. The owner acknowledged on the stand that there was no document supporting her claim among the materials subpoenaed from the 109th Precinct. In summation, counsel again pointed out to the jury, without dispute, that all complaints made by the owner were subpoenaed from the 109th Precinct and

that there was no complaint corroborating the owner's testimony as to the prior threats. Because the testimony of the Commander of the 109th Precinct would have added nothing to the evidence already before the jury, the trial court acted within its discretion in refusing to require the witness' attendance.

Since the applicable law is undisputed and since the court did no more than exercise its discretion to preclude cumulative testimony, review of this issue by this Court is unwarranted.

CONCLUSION

The issues presented by petitioners raise no conflict among state or federal court decisions nor do they raise any problem of substantial significance meriting this Court's review. The relevant legal principles are undisputed and the state courts applied those principles in a manner fully consistent with this Court's opinions. Accordingly, the writ of certiorari should be denied.

Respectfully submitted,

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